

In The

CLERK

Supreme Court of the United States

October Term, 1995

THE HONORABLE WILLIAM STRATE, ASSOCIATE TRIBAL JUDGE OF THE TRIBAL COURT OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION; THE TRIBAL COURT OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION; LYNDON BENEDICT FREDERICKS; KENNETH LEE FREDERICKS; PAUL JONAS FREDERICKS; HANS CHRISTIAN FREDERICKS; JEB PIUS FREDERICKS; GISELA FREDERICKS,

Petitioners,

v.

A-1 CONTRACTORS; LYLE STOCKERT,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to Sup. Ct. R. 15.8, Petitioners file this Supplemental Brief to call the Court's attention to the recent decision of the United States Court of Appeals for the Ninth Circuit in *Yellowstone County v. Pease*, No. 95-36026, 1996 WL 512363 (9th Cir. Sept. 11, 1996) (*Pease*). *Pease* is relevant to consideration of the petition for *certiorari* in this case as follows.

1. *Pease* exemplifies the confusion over the *Montana* rule.¹ The court in *Pease* is apparently of the view that the *Montana* rule applies to the activities of non-Indians anywhere within an Indian reservation, regardless of the status of the land on which the activities occur. *Pease*, 1996 WL 512363, at *5. This is inconsistent with *Montana*, which expressly distinguished between "land belonging to the Tribe or held by the United States in trust for the Tribe . . ." and "land owned in fee by non-members of the Tribe. . . ." 450 U.S. at 557. See also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), wherein this Court held that:

Our decision in *Montana v. United States, supra*, does not resolve this question. Unlike this case, *Montana* concerned lands located within the reservation, but *not* owned by the Tribe or its members. We held that the Crow Tribe could not as a general matter regulate hunting and fishing on those lands. But as to 'land belonging to the Tribe or held by the United States in trust for the Tribe,' we 'readily agree[d]' that a Tribe may

¹ *Montana v. United States*, 450 U.S. 544 (1981). The *Montana* rule is set out in the Petition at 9.

'prohibit nonmembers from hunting or fishing . . . [or] condition their entry by charging a fee or establish bag and creel limits.'

462 U.S. at 330-331 (emphasis in original; citations and footnote omitted).

2. *Pease* shows that the *Montana* rule cannot be extended to lands other than non-Indian fee lands without conflicting with the *Iowa Mutual* rule.² As does the *en banc* majority in the present case, *A-1 Contractors v. Strate*, the court in *Pease* merely forces a reconciliation by subsuming the *Iowa Mutual* rule into the *Montana* rule. *Pease*, 1996 WL 512363, at *6-7.

3. *Pease* misconstrues *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994), cert. denied, 115 S.Ct. 485 (1994) (*Hinshaw*), a case cited by Petitioners as being in conflict with the *en banc* majority in *A-1 Contractors v. Strate*.³ *Hinshaw* upheld tribal court jurisdiction over a tort case arising on a reservation and brought by a tribal member against a non-Indian. 42 F.3d at 1180-81. In straining to avoid any conflict between *Hinshaw* and *Montana*, the court in *Pease* interprets *Hinshaw* as "implicitly" having been decided under the *Montana* rule. *Pease*, 1996 WL 512363, at *7. As we have pointed out, however, *Hinshaw* "applied the *Iowa Mutual* rule, not the *Montana* rule." Petition at 14, *Hinshaw* therefore is in conflict with the *en banc* majority in *A-1 Contractors v. Strate* regarding the issue of which rule governs tort cases arising on Indian land.

4. *Pease* supports Petitioners' alternative argument that reservation contacts, such as those that A-1 Contractors had when it allegedly committed a tort on the Reservation here, are sufficient to sustain tribal court jurisdiction under the *Montana* "tribal interest test."⁴ The court in *Pease* interprets *Hinshaw* as holding that a tribe's exercise of sovereign authority "coupled with the tortfeasor's specific contacts with the reservation . . . [create] the requisite 'tribal interest' under *Montana*." *Pease*, 1996 WL 512363, at *7. Assuming *arguendo* that this interpretation of *Hinshaw* is correct, then *Hinshaw* is in conflict with the holding of the *en banc* majority in *A-1 Contractors v. Strate* on this point. See also *Williams v. Lee*, 358 U.S. 217 (1959) (upholding tribal court jurisdiction over a contract action brought by a non-Indian who dealt with a tribal member on a reservation).

Respectfully submitted,

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² *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). The *Iowa Mutual* rule is set out in the Petition at 8.

³ See Petition at 13-15.

⁴ The *Montana* "tribal interest test" is set out in the Petition at 15-20.